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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

KEASEL, ERIC S

ART UNIT

PAPER NUMBER

3754

DATE MAILED: 12/16/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

09/641,101

Applicant(s)

CARLSON ET AL.

Examiner

Eric Keasel

Art Unit

3754

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 02 January 2002 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☒ A Notice of Appeal was filed on 02 January 2002. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
 - (b) ☐ they raise the issue of new matter (see Note below);
 - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☐ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:


Claim(s) allowed: 1-9.

Claim(s) objected to: _____.

Claim(s) rejected: 10-42.

Claim(s) withdrawn from consideration: _____.

8. ☐ The proposed drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
10. ☐ Other: See Continuation Sheet


KENNETH BOMBERG
PRIMARY EXAMINER

Continuation of 5. does NOT place the application in condition for allowance because: of the reasons set forth in the final rejection (see section 10 below for additional discussion).

Continuation of 10. Other: Applicant asserts that applicants routinely are permitted to copy claims which contain limitations not found in applicant's disclosure. Applicant cites 37 CFR 1.606 and MPEP 2305 to support this assertion. The examiner disagrees. There is simply nothing in 37 CFR 1.606 or MPEP 2305 (or anywhere else) to support applicant's assertion. If the patent office were to allow such copying of claims, any applicant who has an application pending for a number of years could copy all claims from all issued patents that were filed after applicant's filing date. This is absurd. Applicant has copied 30 claims which are simply NOT supported by applicant's disclosure and those 30 claims have been properly rejected under 35 USC 251 and 35 USC 112 1st paragraph. The rejection under the recapture of cancelled subject matter is correct also (see MPEP 1412.02). Applicants argue that since one of the case citations (not the most recent) pertain to a case with a different set of facts, that the entire concept of improper recapture as outlined in MPEP 1412.02 should be ignored. The examiner disagrees.



KENNETH BOMBERG
PRIMARY EXAMINER

Attachment for PTO-948 (Rev. 03/01, or earlier)
6/18/01

The below text replaces the pre-printed text under the heading, "Information on How to Effect Drawing Changes," on the back of the PTO-948 (Rev. 03/01, or earlier) form.

INFORMATION ON HOW TO EFFECT DRAWING CHANGES

1. Correction of Informalities -- 37 CFR 1.85

New corrected drawings must be filed with the changes incorporated therein. Identifying indicia, if provided, should include the title of the invention, inventor's name, and application number, or docket number (if any) if an application number has not been assigned to the application. If this information is provided, it must be placed on the front of each sheet and centered within the top margin. If corrected drawings are required in a Notice of Allowability (PTOL-37), the new drawings **MUST** be filed within the **THREE MONTH** shortened statutory period set for reply in the Notice of Allowability. Extensions of time may **NOT** be obtained under the provisions of 37 CFR 1.136(a) or (b) for filing the corrected drawings after the mailing of a Notice of Allowability. The drawings should be filed as a separate paper with a transmittal letter addressed to the Official Draftsperson.

2. Corrections other than Informalities Noted by Draftsperson on form PTO-948.

All changes to the drawings, other than informalities noted by the Draftsperson, **MUST** be made in the same manner as above except that, normally, a highlighted (preferably red ink) sketch of the changes to be incorporated into the new drawings **MUST** be approved by the examiner before the application will be allowed. No changes will be permitted to be made other than correction of informalities, unless the examiner has approved the proposed changes.

Timing of Corrections

Applicant is required to submit the drawing corrections within the time period set in the attached Office communication. See 37 CFR 1.85(a)

Failure to take corrective action within the set period will result in **ABANDONMENT** of the application.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 16

Application Number: 09/641,101
Filing Date: August 17, 2000
Appellant(s): CARLSON ET AL.

MAILED
DEC 16 2002
GROUP 3700

Thaddius J. Carvis
For Appellants

EXAMINER'S ANSWER

This is in response to the appeal brief filed 9 August 2002.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement that there are no related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellants' statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

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(6) *Issues*

The appellants' statement of the issues in the brief is substantially correct. The changes are as follows: issue number 3 is no longer an issue because the examiner withdrew the art rejections in Paper No. 14. Appellants acknowledge this fact elsewhere in the brief and presents no arguments with respect to the merits of the withdrawn art rejections. Also, in issue number 2, it appears that "same" should be --some--. The issues can be summarized as follows:

1) Is the rejection of claims 10-17, 19, 20, 22, and 24-42 under 35 U.S.C. 112, first paragraph, as containing new matter proper?

1a) Is the rejection of claims 10-17, 19, 20, 22, and 24-42 under 35 U.S.C. 251 as being based upon new matter added to the patent for which reissue is sought proper?

2) Is the rejection of claims 18, 21, and 23 under 35 U.S.C. 251 as being an improper recapture of broadened claimed subject matter surrendered in the application for the patent upon which the present reissue is based proper?

(7) *Grouping of Claims*

The rejection of claims 10-17, 19, 20, 22, and 24-42 stand or fall together because appellants' brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

The rejection of claims 18, 21, and 23 stand or fall together because appellants' brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

No prior art is relied upon by the examiner in the rejection of the claims under appeal.

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

Claims 10-17, 19, 20, 22, and 24-42 stand rejected under 35 U.S.C. 251 as being based upon new matter added to the patent for which reissue is sought. The added material which is not supported by the prior patent is as follows:

- i) the connector on the insert member (claims 10-17, 19, 20, 27, 30-32, and 42);
- ii) the insert member attached to the valving member (claims 10-17, 19, 27, 30, 32, and 42);
- iii) the insert member attached to the valve seat (claims 20, 31, and 38);
- iv) the insert member having a parabolic opening (claims 17, 22, 28-38, 41, and 42);
- v) the valving member being formed from brass or stainless steel (claim 24);
- vi) the insert members made of plastic (claims 15 and 25);
- vii) the inserts having a diameter corresponding to the diameter of the bore of the valving member (claims 13, 14, and 26);
- viii) the valving member and connectors of the insert members comprising cooperating legs and pockets (claims 11 and 27); and
- ix) a portion of the valve seat extending across the fluid passage and having an elongate opening (claims 39 and 40).

Claims 18, 21, and 23 stand rejected under 35 U.S.C. 251 as being an improper recapture of broadened claimed subject matter surrendered in the application for the patent upon which the present reissue is based. See *Hester Industries, Inc. v. Stein, Inc.*, 142 F.3d 1472, 46 USPQ2d 1641 (Fed. Cir. 1998); *In re Clement*, 131 F.3d 1464, 45 USPQ2d 1161 (Fed. Cir. 1997); *Ball Corp. v. United States*, 729 F.2d 1429, 1436, 221 USPQ 289, 295 (Fed. Cir. 1984). A broadening aspect is present in the reissue which was not present in the application for patent. The record of the application for the patent shows that the broadening aspect (in the reissue) relates to subject matter that appellant previously surrendered during the prosecution of the application. Accordingly, the narrow scope of the claims in the patent was not an error within the meaning of 35 U.S.C. 251, and the broader scope surrendered in the application for the patent cannot be recaptured by the filing of the present reissue application.

During prosecution of US Patent Application Number 09/084,698 (US Patent Number 6,039,304, the basis of the present reissue application), the following subject matter relating to the exact manner in which the insert disk is retained (attached) was introduced into independent claims 1, 15, and 22 in order to avoid art rejections and is subject matter that is surrendered (please note, the amendment to claims 1 and 15 was made in Paper No.10 and the amendment to claim 22 was made in Paper No. 13; claims 1, 15, and 22 were renumbered claims 1, 4, and 6 upon allowance):

“wherein at least one of the casing openings forms a groove” and “an internal retaining ring sized and shaped to fit at least partially inside the groove, wherein the disk is retained by the

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internal retaining ring which is at least partially recessed into the groove in one of the casing openings”

Appellants’ reissue claims 18, 21, and 23 are rejected on the ground of improper recapture of subject matter surrendered during prosecution to avoid art rejections. Reissue claims 18, 21, and 23 have broadened the limitations regarding the exact manner in which the disk insert is attached across the fluid passage by reciting that the inserts are merely “attachable across said fluid passage”. Since this broadened aspect of the claims relates to the surrendered subject matter, in that the exact manner of attachment was the same subject matter that was surrendered during prosecution of the original application (i.e. introduced because it was necessary to overcome the art rejections), and since recapture was not avoided (in the reissue claims) by addition of limitations relating to the specific aspect that was narrowed during prosecution (i.e. the exact manner of attachment), the broadening of the claims represents improper recapture.

Claims 10-17, 19, 20, 22, and 24-42 stand rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The following subject matter is not supported in the specification.

- i) the connector on the insert member (claims 10-17, 19, 20, 27, 30-32, and 42);
- ii) the insert member attached to the valving member (claims 10-17, 19, 27, 30, 32, and 42);
- iii) the insert member attached to the valve seat (claims 20, 31, and 38);

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- iv) the insert member having a parabolic opening (claims 17, 22, 28-38, 41, and 42);
- v) the valving member being formed from brass or stainless steel (claim 24);
- vi) the insert members made of plastic (claims 15 and 25);
- vii) the inserts having a diameter corresponding to the diameter of the bore of the valving member (claims 13, 14, and 26);
- viii) the valving member and connectors of the insert members comprising cooperating legs and pockets (claims 11 and 27); and
- ix) a portion of the valve seat extending across the fluid passage and having an elongate opening (claims 39 and 40).

(11) *Response to Argument*

Argument A (claims 10-17, 19, 20, 22, and 24-42)

Re limitation i) the connector on the insert member (claims 10-17, 19, 20, 27, 30-32, and 42), appellants argue that the flange (ref no. 8 in Fig. 8 of '304) is equivalent in its function to the connector of '890. The examiner disagrees, the flange of '304 does not connect to anything; therefore, it is not a connector. In fact, the limitations added to the independent claims of '304 are directed to the retaining ring (9), which is a necessary component because the insert member has no connectors. In contrast, the connector (48 of '890) connects to either the valving member or the valve seat.

Re limitations ii) the insert member attached to the valving member (claims 10-17, 19, 27, 30, 32, and 42) and iii) the insert member attached to the valve seat (claims 20, 31, and 38), appellants argue that "attach" should be given the broadest reasonable interpretation.

However, this is misleading because the limitations not supported recite that the insert member is attached to specific structure (either the valving member or the valve seat). Attaching the insert member to either the valving member or the valve seat is clearly not disclosed by appellants.

Appellants further argue that these features are not patentably distinct and therefore not material from the embodiment in appellants' disclosure. It should be noted that 35 USC 112 1st paragraph new matter and 35 USC 251 new matter issues are not related to 35 USC 103 obviousness issues. Therefore, the argument is not germane to the rejection of record. Furthermore, since the specifics of the exact nature (how and where) of the attachment of the insert member across the flow path were amended into the independent claims of the '304 patent to overcome the prior art, appellants' arguments that those features fail to constitute patentably distinct features contradict the prosecution history of the patent upon which the present reissue is based (please note, the amendment to claims 1 and 15 was made in Paper No.10 and the amendment to claim 22 was made in Paper No. 13; claims 1, 15, and 22 were renumbered claims 1, 4, and 6 upon allowance).

Re limitation iv) the insert member having a parabolic opening (claims 17, 22, 28-38, 41, and 42), there is no reasonable interpretation of "parabolic" that includes the pie-shaped wedge of appellant. Appellants argue that the '890 patent does not illustrate a true parabolic curve. The examiner disagrees. '890 clearly discloses a parabolic opening for the insert in both the specification and figures (see, for example, Figs. 4, 5, and 7 and column 5, line 26, column 6, lines 6 and 67, and column 7, lines 28 and 35, of the specification). Appellants disclose a pie-shaped wedge (see Figs. 3 or 5), the curved portion of the wedge is circular, not parabolic. Furthermore, appellants' assertion that '890 does not disclose a true parabolic curve (i.e. the

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disclosure of '890 is not enabling for the claims of '890) is not germane to the issue being argued (i.e. does the disclosure of '304 support the claims of '890).

Re limitations v) the valving member being formed from brass or stainless steel (claim 24) and vi) the insert members made of plastic (claims 15 and 25), these materials are not disclosed by appellants' original disclosure. The argument that a claim limitation should be considered as disclosed if it not disclosed (but considered obvious) is without merit. Issues relating to 35 USC 112 1st paragraph (new matter) and 35 USC 251 (new matter) are not related to 35 USC 103 obviousness issues.

Re limitation vii) the inserts having a diameter corresponding to the diameter of the bore of the valving member (claims 13, 14, and 26), appellants argue that "the inserts having a diameter corresponding to the diameter of the bore of the valving member" should be considered as disclosed because appellants' insert is larger than the bore diameter and thus has "a diameter" arbitrarily chosen that would correspond to the bore diameter. This claim limitation can not reasonably be read that broadly because it is presented in dependent claims 13 and 26, which must further limit independent claims 10 and 18. The independent claims recite the insert and the insert must inherently correspond or be larger than the bore diameter. To further limit claims 10 and 18, claims 13 and 26 must be read as a distinct diameter on the insert rather than an arbitrarily chosen diameter.

Re limitation viii) the valving member and connectors of the insert members comprising cooperating legs and pockets (claims 11, 27, and 32), these features are not disclosed. Appellants further argue that these features are not patentably distinct and therefore not material from the embodiment in appellants' disclosure. It should be noted that 35 USC 112 1st paragraph

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new matter issues and 35 USC 251 new matter issues are not related to 35 USC 103 obviousness issues. Therefore, the argument is not germane to the rejection of record. Furthermore, since the specifics of the exact nature (how and where) of the attachment of the insert member across the flow path were amended into the independent claims of the '304 patent to overcome the prior art, appellants' arguments that those features fail to constitute patentably distinct features contradict the prosecution history of the patent upon which the present reissue is based (please note, the amendment to claims 1 and 15 was made in Paper No.10 and the amendment to claim 22 was made in Paper No. 13; claims 1, 15, and 22 were renumbered claims 1, 4, and 6 upon allowance).

Re limitation ix) a portion of the valve seat extending across the fluid passage and having an elongate opening (claims 39 and 40), this limitation is not disclosed. Appellants further argue that these features are not patentably distinct and therefore not material from the embodiment in appellants' disclosure. It should be noted that 35 USC 112 1st paragraph new matter issues and 35 USC 251 new matter issues are not related to 35 USC 103 obviousness issues. Therefore, the argument is not germane to the rejection of record.

Appellants' contention that none of the limitations identified by the examiner is material to patentability is not correct. In fact, four of these limitations are directly related to the manner and location of connection between the insert member and either the valving member or the valve seat. Since the specifics of the exact nature (how and where) of the attachment of the insert member across the flow path were amended into the independent claims of the '304 patent to overcome the prior art, appellants' arguments that those features fail to constitute patentably distinct features contradict the prosecution history of the patent upon which the present reissue is based (please note, the amendment to claims 1 and 15 was made in Paper No.10 and the

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amendment to claim 22 was made in Paper No. 13; claims 1, 15, and 22 were renumbered claims 1, 4, and 6 upon allowance). More importantly, 35 USC 112 1st paragraph new matter issues and 35 USC 251 new matter issues are not related to 35 USC 103 obviousness issues. Therefore, the argument is not germane to the rejection of record.

It is clear that none of the above nine limitations are supported by the originally filed 09/084,698. Appellants' assert that they are permitted to copy claims which contain limitations not found in the original disclosure. Appellants cite 37 CFR 1.606 and MPEP 2305 to support this assertion. The examiner disagrees. There is nothing in 37 CFR 1.606 or MPEP 2305 (or anywhere else) to support appellants' assertion.

Appellants' argument A then digresses into assertions with respect to what could have been done during the prosecution of the reissue application. In what appears to be an admission that addition of new matter is improper, appellants suggest that amendments could have been made during prosecution to claims 19 and 27 eliminating the new matter. These arguments are not relevant to the claims under appeal. The appellants have chosen to present and to prosecute the pending claims. The appellants have further elected to appeal these same claims. Consequently, the claims of record have been examined (claims 1-9 were allowed and claims 10-42 have been finally rejected) and the appeal should only consider the claims of record. It should be noted that if appellants had presented fully supported, broadened, amended claims 19 and 27, they may or may not have been rejected on prior art and would not necessarily be proper interference counts.

Argument B (claims 18, 21, and 23)

Appellants argue that the application of recapture should not be rigid (i.e. automatically applied) and requires analysis of the particular factual situations. The examiner agrees with appellants' statement. That is why the particular factual situation has been analyzed by the examiner. It appears that appellants purport a rigid application of the doctrine of recapture (see page 10, second full paragraph). Appellants state "[i]n *Ball* the CAFC permitted a reissue applicant to proceed with claims which were narrower in some respects and broader in other respects than were the claims in the issued patent. Clearly, Appellants' claims 18, 21, and 23 are claims which the *Ball* Court would not have rejected based on recapture." Appellants advocate a rigid application of the recapture doctrine to permit claims which are narrower in some aspects and broader in other respects without an analysis of the particular factual situations regarding what subject matter was surrendered during prosecution of the patent upon which the present reissue is based and what limitations of the reissue claims are broader or narrower. Such a rigid application of the recapture doctrine would not be proper. The application of the recapture rule requires analysis of the particular factual situations regarding what subject matter was surrendered during prosecution of the parent application and what limitations of the reissue claims are broader or narrower. Application of the recapture rule is a multistep process. *Pannu v. Storz Instruments Inc.*, 59 USPQ2d 1597 (CAFC 2001)

The first step is to determine whether and in what aspect the reissue claims are broader than the patent claims. In the present situation, reissue claims 18, 21, and 23 are broader than the patent claims in the aspect of how and where the insert members (disks) are attached. Reissue claims 18, 21, and 23 broadly recite that the insert members (disks) are merely "attachable across

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said fluid passage". This is much broader than the particular attachment structure in independent claims 1, 4, and 6 of US Patent Number 6,039,304 which require the limitations "wherein at least one of the casing openings forms a groove" and "an internal retaining ring sized and shaped to fit at least partially inside the groove, wherein the disk is retained by the internal retaining ring which is at least partially recessed into the groove in one of the casing openings".

The second step is to determine whether the broader aspects of the reissued claims relates to the surrendered subject matter. This is clearly the case because the limitations "wherein at least one of the casing openings forms a groove" and "an internal retaining ring sized and shaped to fit at least partially inside the groove, wherein the disk is retained by the internal retaining ring which is at least partially recessed into the groove in one of the casing openings" were added to the independent claims in order to overcome the art rejections.

The third step is to determine whether the reissued claims were materially narrowed in other respects to avoid the recapture rule. However, the only respects of the reissue claims that are narrower do not relate to the manner and location of the attachment. Therefore, the reissued claims were not narrowed in other respects to avoid the recapture rule.

The examiner has not applied a rigid doctrine. The examiner has done the requisite analysis of the particular factual situation. Reissued claims that are broader than the original patent's claims in a manner directly pertinent to the subject matter surrendered during the prosecution are impermissible. See, for example, *In re Clement* (CAFC) 45 USPQ2d 1161:

"deliberate withdrawal or amendment does not involve inadvertence or mistake contemplated by Section 251, and recapture rule therefore prevents patentee from regaining, through reissue, subject matter surrendered in effort to obtain allowance of original claims;

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under this rule, reissue claims that are broader than original claims in manner directly pertinent to subject matter surrendered during prosecution are impermissible.”

Appellants offer no arguments about the particular factual situations regarding what subject matter was surrendered during prosecution of the patent upon which the present reissue is based and what limitations of the reissue claims are broader or narrower. Accordingly, argument B is without merit.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Henry C. Yuen
Supervisory Patent Examiner
Group 3700

EK 29 OCT 02

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October 29, 2002

Conferees
John Bastianelli



Kenneth Bomberg



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